Che Hong Yee v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO 24–748 OF 2007
VT SINGHAM J
14 DECEMBER 2007

Administrative Law — Exercise of administrative powers — Judicial review — Role of court to review legality and not merits of administrative decisions

Administrative Law — Rules of natural justice — Audi alteram partem — Plaintiff arrested and detained under s 2(i) of the Restricted Residence Act 1933 — Plaintiff granted opportunity to appeal within 14 days — Documents to appeal only given to him after 14 days — Whether excuse of administrative difficulties an excuse to be considered

Banishment — Arrest and detention — Restricted Residence Act 1933 — Validity of order — Appeal against decision of Deputy Minister — Plaintiff not notified of such avenue to appeal — Whether order invalidated by failure to notify plaintiff — Restricted Residence Act 1933 s 2(i) & (ii)

The plaintiff was arrested on 9 March 2007 pursuant to a warrant of arrest and detention dated 6 March 2007 in Form A ('the first order') issued by the Deputy Minister of Internal Security ('Deputy Minister') under s 2(i) of the Restricted Residence Act 1933 ('the 1933 Act'). On the same day he was taken to prison at Kluang and detained until 23 March 2007. The grounds of the arrest and detention were stated in a separate sheet marked as lampiran A attached to the first order. By para 2 of lampiran A, the plaintiff was granted an opportunity to appeal to the Deputy Minister within 14 days from the date of receipt of the said grounds. By a subsequent order dated 23 March 2007, the Deputy Minister had issued an order to restrict the plaintiff to reside in the Mukim Kuala Dungun, District of Dungun, Terengganu for three years from the date of the order pursuant to s 2(ii) of the 1933 Act ('the second order'). The plaintiff being dissatisfied with the second order applied for judicial review to quash the second order against him. Learned counsel for the plaintiff had, inter alia, submitted that: (i) the act of the first defendant was mala fide and contravened s 2(i) of the 1933 Act; (ii) the failure of the third defendant to hand over a copy of the first

order and lampiran A on 9 March 2007 and the failure of the defendant to accord to the plaintiff the right to effectually appeal had deprived the plaintiff the right to be heard. The first order together with lampiran A was only handed to the plaintiff on the 14th day ie on 24 March 2007 after the Deputy Minister had issued the second and final order dated 23 March 2007 to restrict the plaintiff to Dungun, Terengganu and before he was taken from Kluang prison to Dungun; (iii) the prison authority in Kluang prison had failed to inform the plaintiff of his rights and that the detention of the plaintiff in Kluang prison was for an unreasonable period as the plaintiff was detained for 14 days from the time the first order was issued; (iv) the defendant had failed to comply with s 2(i) of the 1933 Act by failing to issue Borang B being the warrant of detention under the schedule of the 1933 Act; (v) the second order issued by the Deputy Minister was in breach of the rules of natural justice and the constitutional guarantee and the second order ought to be quashed.

Held, setting aside the second order:

(1) The unauthorised tactical manoeuvre of not handing the first order with lampiran A to the plaintiff at the time when he was asked to acknowledge receipt of the same on 9 March 2007 and handing the same to him at the expiry of the 14 days was a diversion or an unauthorised departure which had deprived the plaintiff of his right to be heard as accorded to him by the Deputy Minister. The conduct of the police constituted a serious departure from the principles of natural justice and his constitutional right of making representations against the first order and to effectively controvert, contradict or explain the charge against him (see para 16); *R v Archbishop of Canterbury* [1944] 1 All ER 179 referred.

(2) Failure to supply the copy of the first order together with lampiran A which entitled the plaintiff to make representation to the Deputy Minister amounted to a violation and strike at the core of the rules of natural justice. Where the Deputy Minister who had the statutory power to restrict a person of his personal liberty under the 1933 Act had in fact granted an opportunity to the person to be heard and to make representations, the police could not unilaterally or arbitrarily strip him of the right and the opportunity given to him to appeal within 14 days by unlawful means and subject him to the mercy of the police as it happened in the instant case (see para 16).

(3) Further, the reason advanced by the police for not having handed the first order and lampiran A to the plaintiff on the grounds of administrative convenience was unacceptable, unforgivable and inexcusable as it was so fundamental and must be condemned as it had

virtually and practically deprived the plaintiff of his right to appeal although it appeared on record that he had acknowledged receipt of the same (see para 17). A

(4) To wait for 14 days period to be over before handing the first order together with copy of lampiran A to the plaintiff after the second order under s 2(ii) of the 1933 Act had been issued was meaningless and appeared to be tainted with bad faith as the appeal process became ineffective. The fashion in which the process was carried out by the police appeared to be entirely improper, inappropriate and incorrect which had deprived the plaintiff of his right to be heard resulting the second order to be void and ineffectual to bind the plaintiff as it had injured a constitutionally guaranteed right (see *Navabkhan Abbas Khan v State of Gujurat* AIR 1974 SC 1471). The court was therefore endowed with the function of protecting and safeguarding the right as guaranteed by the Federal Constitution ('Constitution')against encroachment by the executive (see para 21 & 23). B C D

(5) This court was of the view that prima facie, where notices containing the charge were not effectively served on the plaintiff, ie was not received by the intended recipient the position corresponded to that in which no notice was given, and the order to restrict him under the 1933 Act would in consequence be invalidated. The right of a man to his liberty as enshrined in the Constitution was just as important to him if not more important than his rights to property (see para 31). E

(6) It was important to stress that mere administrative difficulties, simpliciter, were not, sufficient to deprive the plaintiff of the most crucial set of documents which he was asked to acknowledge as having received but was not handed to him on the grounds that it was required for administrative and documentation purposes, 'it has been said convenience and justice are often not on speaking terms' (see *General Medical Council v Spackman* [1943] 2 All ER 339 at p 341; *R v Hull Prison Board of Visitors; ex parte St Germain & Ors (No 2)* [1979] 3 All ER 545). It was also important to stress that administrative convenient could not override an individual right to appeal or to be heard as provided under the Constitution where it affected the right to liberty (at p 50). F G H

(7) Based on the aforesaid reasons, there had been a constitutional breach and violation of the rules of natural justice which had deprived the plaintiff from exercising his right of appeal to the Deputy Minister within the 14 days period as provided in lampiran A (see para 53). I

[Bahasa Malaysia summary

Plaintif ditangkap pada 9 Mac 2007 berikutan suatu waran tangkap dan

tahanan bertarikh 6 Mac 2007 di dalam Borang A ('perintah pertama') yang dikeluarkan oleh Timbalan Menteri Keselamatan Dalam Negeri ('Timbalan Menteri') di bawah s 2(i) Akta Kediaman Terhad 1933 ('Akta 1933'). Pada hari yang sama, dia dibawa ke penjara di Kluang dan ditahan sehingga 23 Mac 2007. Alasan-alasan tangkapan dan tahanan telah dinyatakan di atas kertas yang berasingan ditandakan sebagai lampiran A yang dilampirkan dengan perintah pertama tersebut. Melalui perenggan 2 lampiran A, plaintif diberi peluang merayu kepada Timbalan Menteri dalam masa 14 hari dari tarikh penerimaan alasan-alasan tersebut. Melalui satu perintah seterusnya yang bertarikh 23 Mac 2007, Timbalan Menteri telah mengeluarkan satu perintah menghadkan plaintif untuk menetap di Mukim Kuala Dungun, Daerah Dungun, Terengganu untuk tiga tahun dari tarikh perintah tersebut mengikut s 2(ii) Akta 1933 tersebut ('perintah kedua'). Tidak berpuas hati dengan perintah kedua, plaintif memohon untuk semakan kehakiman untuk membatalkan perintah kedua terhadapnya. Peguamcara plaintif yang bijaksana berhujah, antara lain, bahawa: (i) tindakan defendan pertama adalah mala fide dan melanggar s 2(i) Akta 1933 tersebut; (ii) kegagalan defendan ketiga menyerahkan sesalinan perintah pertama dan lampiran A pada 9 Mac 2007 dan kegagalan defendan untuk memberikan kepada plaintif hak untuk merayu dengan berkesan telah menafikan hak plaintif untuk didengar. Perintah pertama bersama dengan lampiran A hanya diserahkan kepada plaintif pada hari ke 14 iaitu pada 24 Mac 2007 selepas Timbalan Menteri mengeluarkan perintah kedua dan muktamad bertarikh 23 Mac 2007 untuk menghadkan plaintif ke Dungun, Terengganu dan sebelum dia diambil dari penjara Kluang ke Dungun; (iii) pihak berkuasa penjara di penjara Kluang telah gagal memaklumkan kepada plaintif akan hak-haknya dan plaintif ditahan di penjara Kluang untuk jangka masa yang tidak munasabah oleh kerana plaintif ditahan untuk 14 hari dari tempoh perintah pertama dikeluarkan; (iv) defendan telah gagal mematuhi s 2(i) Akta 1933 tersebut dengan kegagalan mereka mengeluarkan Borang B iaitu waran penahanan di bawah jadual Akta 1933 tersebut; (v) perintah kedua dikeluarkan oleh Timbalan Menteri adalah melanggar rukun keadilan asasi dan jaminan perlembagaan dan perintah kedua harus dibatalkan.

Diputuskan, mengenepikan perintah kedua:

(1) Tindakan taktikal tanpa kebenaran ini dengan tidak menyerahkan perintah pertama tersebut dengan lampiran A kepada plaintif pada masa dia disuruh akui terimanya pada 9 Mac 2007 dan menyerahkannya kepada plaintif selepas tamat tempoh 14 hari adalah pengubahan atau peninggalan yang tidak dibenarkan yang menafikan plaintif akan haknya untuk didengar seperti yang diberikan oleh Timbalan Menteri. Tindakan polis membentuk penyimpangan yang serius daripada prinsip-prinsip keadilan asasi dan hak perlembagaannya

untuk membuat representasi terhadap perintah pertama tersebut dan untuk mempertikaikan, menyangkal atau menjelaskan secara berkesan tuduhan terhadapnya (lihat para 15); *R v Archbishop of Canterbury* [1944] 1 All ER 179 dirujuk.

(2) Kegagalan untuk membekalkan sesalinan perintah pertama bersama dengan lampiran A yang memberi hak kepada plaintif untuk membuat representasi kepada Timbalan Menteri adalah satu perlanggaran dan melanggar teras rukun keadilan asasi. Di mana Timbalan Menteri yang mempunyai kuasa statutori untuk menghadkan seseorang akan kebebasan dirinya di bawah Akta 1933 tersebut, sebenarnya telah memberikan peluang kepada orang tersebut untuk didengar dan membuat representasi, pihak polis tidak boleh secara di satu pihak atau sewenang-wenangnya melucutkan hak dan peluang yang diberikan kepadanya untuk merayu dalam jangkamasa 14 hari dengan cara salah dan menyebabkan dia bergantung nasib kepada polis seperti yang terjadi dalam kes ini (lihat perenggan 16).

(3) Selanjutnya, alasan yang dikemukakan oleh polis kerana tidak menyerahkan perintah pertama tersebut dan lampiran A kepada plaintif atas alasan kemudahan administratif tidak boleh diterima dan tidak boleh dimaafkan kerana ia adalah asas dan mesti dihukum kerana ia sebenarnya dan secara praktikal menafikan plaintif akan haknya untuk merayu walaupun ia tertera di atas rekod bahawa dia mengakui menerimanya (lihat perenggan 17).

(4) Untuk menunggu tempoh selama 14 hari berakhir sebelum menyerahkan perintah pertama tersebut bersama dengan salinan lampiran A kepada plaintif selepas perintah kedua di bawah s 2 (ii) Akta 1933 dikeluarkan adalah tidak bermakna dan seperti dicemari dengan niat jahat faith kerana proses rayuan menjadi tidak efektif. Cara bagaimana proses tersebut dijalankan oleh polis kelihatan tidak betul, tidak wajar dan salah yang mana menafikan plaintif haknya untuk didengar mengakibatkan perintah kedua tersebut batal dan tidak berkesan untuk mengikat plaintif kerana ia telah melanggar hak yang dijamin oleh perlembagaan (lihat *Navabkhan Abbas Khan v State of Gujurat* AIR 1974 SC 1471). Mahkamah oleh itu diberi kuasa untuk berfungsi untuk melindungi dan menjaga hak yang dijamin oleh Perlembagaan Persekutuan ('Perlembagaan') terhadap pencerobohan oleh eksekutif (lihat perenggan 21 & 23).

(5) Mahkamah berpendapat bahawa prima facie, di mana notis-notis mengandungi tuduhan tidak secara berkesan disampaikan kepada plaintif, iaitu tidak diterima oleh penerima yang diniatkan ia adalah seperti tiada notis diberikan, dan perintah sekatan di bawah Akta 1933 tersebut akibatnya akan terbatal. Hak seseorang kepada kebebasannya

A seperti yang diperuntukkan di dalam Perlembagaan juga adalah penting kepadanya dan mungkin lebih penting daripada haknya kepada harta benda (lihat perenggan 31).

(6) Ia adalah penting untuk ditegaskan bahawa kepayahan pentadbiran tidak mencukupi untuk menafikan plaintif dokumen-dokumen yang amat penting yang dia disuruh akui terima tetapi tidak diserahkan kepadanya atas alasan bahawa ia diperlukan untuk tujuan administratif dan didokumentasikan, 'it has been said convenience and justice are often not on speaking terms' (lihat *General Medical Council v Spackman* [1943] 2 All ER 339 di ms 341; *R v Hull Prison Board of Visitors; ex parte St Germain & Ors (No 2)* [1979] 3 All ER 545). Ia juga adalah penting untuk ditegaskan bahawa kemudahan administratif tidak boleh mengatasi hak individu untuk merayu dan didengar seperti yang diperuntukkan di bawah Perlembagaan di mana ia menjejaskan hak kebebasan (lihat perenggan 50).

(7) Berdasarkan alasan-alasan di atas, terdapat perlanggaran perlembagaan dan perlanggaran rukun keadilan asasi yang menafikan plaintif daripada menggunakan haknya untuk merayu kepada Timbalan Menteri dalam jangka masa 14 hari seperti yang diperuntukkan di dalam lampiran A (lihat perenggan 53).]

Notes

For a case on Restricted Residence Act 1933, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1783.

For cases on audi alteram partem, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 797–802.

For cases on judicial review, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 46–71.

Cases referred to

AR Antulay v RS Nayak 1988 2 SCC 602 (folld)
Abbott v Sullivan [1952] 1 KB 189 (refd)
Ansell v Wells (1982) 43 ALR 41 (folld)
Assa Singh v Menteri Besar, Johore [1969] 2 MLJ 30 (folld)
Aw Ngoh Leang v Inspector General of Police & Ors [1993] 1 MLJ 65 (refd)
Bonaker v Evans (1850) 16 QB 162 (folld)
Bren v Almagamated Engineering Union [1971] 2 QB 175 (refd)
Cannock Chase DC v Kelly [1978] 1 WLR 1 (refd)
Chin Wee Yee v Menteri Dalam Negeri & Anor [1997] 5 MLJ 585 (refd)
Clear Water Sanctuary Golf Management Bhd v Ketua Pengarah Perhubungan Perusahaan & Anor [2007] 6 MLJ 446 (refd)
Cooper v Wandsworth Board of Works (1863) 14 CB (NS) 180 (folld)
DK Yadav v JMA Industry AIR 1995 SCW (refd)
Datuk James Wong Kim Min, Re [1976] 2 MLJ 245 (refd)

Edward v Bair [1956] All ER 1436 (refd)
Fedco (P) Ltd v SN Bilgrami AIR 1960 SC 415 (refd)
General Medical Council v Spackman [1943] 2 All ER 339 (refd)
Goldsberg v Kelly [1970] 397 US 254 (folld)
Gunn Tan Yap Seng v Ketua Polis Negara & 2 Ors [1991] 2 CLJ 1400 (refd)
JP Berthelsen v Director General of Immigration, Malaysia & Ors [1987] 1 MLJ 134 (folld)
Johannes Choeldi & Ors; Ex parte [1960] MLJ 184 (refd)
Leary v National Union of Vehicle Builder [1971] 1 Ch 34 (refd)
Lee Kew Sang v Timbalan Menteri Dalam Negeri Malaysia & Ors [2005] 3 CLJ 914 (refd)
Leeson v General Council of Medical Education and Registration (1889) 43 Ch D 366 (refd)
M v Homes Office [1992] QB 270 (refd)
Maneka Gandhi v Union of India AIR 1978 SC 597 (refd)
Navabkhan Abbas Khan v State of Gujurat AIR 1974 SC 1471 (refd)
Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri [1994] 3 MLJ 285 (folld)
Noor Ashid bin Sakib v Ketua Polis Negara [2002] 5 MLJ 22 (refd)
PP v Karpal Singh Ram Singh & Another Case [1988] 1 CLJ Rep 249 (refd)
Pearlberg v Varty (Inspector of Taxes) [1972] 1 WLR 534 (refd)
R v Archbishop of Canterbury [1944] 1 All ER 179; [1944] 1 KB 282 (refd)
R v Hull Prison Board of Visitors; ex parte St Germain & Ors (No 2) [1979] 3 All ER 545 (refd)
R v Liverpool Corporation; ex p Taxi Owners Associates [1972] 2 QB 299 (refd)
R v Northumberland Compensation Appeal Tribunal; ex parte Shaw [1952] 1 All ER 122 (refd)
R v Sussex Justices; ex p McCarthy [1924] 1 KB 256 (folld)
Rattan Lal Sharma v Managing Committee AIR 1993 SC 2115 (refd)
Ravi S Naik v Union of India [1994] Supp (2) SCC 641 (folld)
Richard v Wright [1972] 405 US 208 (folld)
Ridge v Baldwin [1964] AC 40 (folld)
Russell v Duke of Norfolk [1949] 1 All ER 109 (refd)
S Selvaraja T Singarathevar v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1997] 2 CLJ Supp 275; [1997] MLJU 476 (refd)
Sagarmal Spinning & Weaving Mills Ltd v Central Board of Direct Taxes [1992] 83 ITR 130 (refd)
Shalini Soni v Union of India AIR 1981 SC 431 (refd)
Smt Indira Nehru Gandhi v Shri Raj Narain AIR 1975 SC 2299 (folld)
Su Yu Min v Ketua Polis Negeri & Ors [2005] 3 CLJ 875 (refd)
Tan Boon Liat @ Allen & Anor, Re [1977] 2 MLJ 108 (refd)
Tan Yap Seng v Ketua Polis Negara & 2 Ors [1991] 2 CLJ 1400 (folld)
Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Cheow Siong Chin [1988] 1 MLJ 432 (folld)
Toy Centre Agencies Pty Ltd v Spencer (1983) 4 ALR 351 (refd)

A *Twist v Randwick Municipal Council* [1976] 12 ALR 379 (folld)
Wiseman v Borneman [1971] AC 299 (folld)

Legislation referred to

Emergency (Public Order and Prevention of Crime) Ordinance 1969
B Federal Constitution arts 5, 5(3), 151(1)(a)
Public Order and Prevention of Crime (Procedure) Rules 1972 r 3, 3(2)
Restricted Residence Act 1933 s 2(i), 2(ii), Forms A, B

Goh Kim Lian (Norma Goh & Co) for the plaintiff.
Mohd Asnawi Abu Hanipah (Federal Counsel, Ministry of Internal Security) for
C *the defendants.*

VT Singham J:

D **[1]** In this case, the plaintiff was arrested at his home in Kluang on 9 March 2007 at/or about 6pm pursuant to a warrant to arrest and detention dated 6 March 2007 in Form A ('the first order') issued by the Deputy Minister of Internal Security under s 2(i) of the Restricted Residence Act 1933 ('the 1933 Act'). Upon arrest, ie on 9 March 2007, the plaintiff was taken to the police
E station at Kluang and detained at the said police station. On the same day, at about 10pm, he was taken to prison at Kluang and detained until 23 March 2007. The grounds of the arrest and detention were stated in a separate sheet marked as lampiran A attached to the first order ('lampiran A'). By para 2 of lampiran A, the plaintiff was granted an opportunity to appeal
F to the Deputy Minister of Internal Security ('Deputy Minister') within 14 days from the date of receipt of the said grounds. The first order reads as follows:

Borang A

G MALAYSIA

WARAN TANGKAP DAN TAHAN

Akta Kediaman Terhad 1933

Seksyen 2(i)

H Kepada Ketua Polis Johor dan semua pegawai-pegawai polis lain dan kepada Pengarah/Penguasa/Timbalan Penguasa Penjara, Penjara Kluang, Johor.

BAHAWASANYA pada pendapat saya menurut peruntukan s 2 Akta Kediaman Terhad 1933, bahawa terdapat beberapa sebab yang munasabah untuk mempercayai bahawa suatu Perintah hendaklah dibuat di bawah s 2(i) dan 2(ii)
I Akta tersebut terhadap CHE HONG YEE No K/P: 570426-01-5379 yang sekarang tinggal di No 21, Jalan Hujung 1, Sri Lalang, 86000 Kluang, Johor.

Maka tuan, pegawai polis tersebut, dengan ini diarahkan supaya menangkap CHE HONG YEE yang tersebut di mana juga ia dijumpai dan menyerahkannya ke Penjara di Kluang, Johor.

Dan Tuan Penguasa Penjara tersebut, adalah dengan ini diarahkan untuk menahan CHE HONG YEE yang tersebut dalam jagaan yang selamat dalam penjara sivil sehingga tuan menerima perintah-perintah selanjutnya melalui saya.

Diperbuat di bawah tandatangan saya pada 6 Mac 2007.

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Dato' Mohd Johari Bin Baharum

Timbalan Menteri Keselamatan Dalam Negeri

Malaysia

[2] Section 2(i) of the 1933 Act states as follows:

2. Order for residence in particular place or exclusion from particular place or places.

(i) Whenever it shall appear to the Minister on such written information and after such enquiry as he may deem necessary that there are reasonable grounds for believing that any person should be required to reside in any particular area or should be prohibited from entering into any particular area or areas the Minister may issue an order in one of the Forms in the Schedule for the arrest and detention or, if he is already in prison, for the detention of that person.

[3] The grounds for issuing the first order as stated in lampiran A are as follows:

AKTA KEDIAMAN TERHAD 1933 DAN

PERKARA 5(3) PERLEMBAGAAN PERSEKUTUAN

ALASAN-ALASAN MENANGKAP CHE HONG YEE

NO K/P: 570426-01-5379

Atas maklumat, laporan dan keterangan bertulis yang diperolehi dalam sesuatu siasatan yang dijalankan oleh pegawai-pegawai yang bertanggungjawab dan berpengalaman dalam membuat penyiasatan dan siasatan mengenai perkara-perkara jenis ini, saya berpuashati bahawa terdapat sebab-sebab bagi mempercayai perkara-perkara jenis ini, saya berpuas hati bahawa terdapat sebab-sebab bagi mempercayai, dan saya sesungguhnya percaya, bahawa kegiatan-kegiatan kamu, di Sekitar Daerah Kluang, Johor:

Tidak mendatangkan faedah kepada keamanan dan ketenteraman awam di situ oleh sebab:

Bahawa kamu adalah seorang 'penganjur' perjudian bookie catit taruh haram (bookie kuda haram) yang beroperasi di sekitar daerah Kluang, Johor semenjak tahun 2000 hingga sekarang. Kamu telah menjalankan kegiatan perjudian

haram ini di rumah kamu di alamat No 21, Jalan Hujung 1, Sri Lalang, Kluang, Johor. Kamu memperolehi pendapatan secara mudah hasil kegiatan haram ini untuk menyara hidup kamu.

2. Jika kamu ingin membuat apa-apa rayuan untuk pertimbangan saya, kamu boleh berbuat demikian *dalam masa empat belas hari selepas menerima alasan-alasan ini.*

Bertarikh pada 6 Mac 2007.

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Dato' Mohd Johari bin Baharum

Timbalan Menteri Keselamatan Dalam Negeri

Malaysia

[4] By a subsequent order dated 23 March 2007, the Deputy Minister had issued an order to restrict the plaintiff to reside in the Mukim Kuala Dungun, District of Dungun, Terengganu for three years from the date of this order pursuant to s 2(ii) of the 1933 Act ('the second order'). The second order reads as follows:

BORANG C

PERINTAH DI BAWAH SEKSYEN 2(ii) AKTA KEDIAMAN TERHAD

Kepada:

Pengarah/Penguasa/Timbalan Penguasa Penjara, Ketua Polis,Terengganu, Lain-lain Pegawai Polis, dan mereka yang berkenaan

Adalah dengan ini diperintahkan bahawa CHE HONG YEE

No Kad Pengenalan 570426-01-5379 Yang sekarang ditahan di Penjara Kluang, Johor

Hendaklah:

(b) bagi tempoh tiga (3) tahun dari tarikh ini

(c) tinggal dalam bahagian di Persekutuan yang dinyatakan daripada ini-iaitu Mukim Kuala Dungun, Daerah Dungun,Terengganu.

Diperbuat di bawah tandatangan saya pada 23 Mac 2007.

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(Dato' Mohd Johari Bin Baharum)

Timbalan Menteri Keselamatan Dalam Negeri

Malaysia

[5] Section 2(ii) and (iii) of the 1933 Act states as follows:

(ii) The Minister thereafter after such further enquiry as he may deem necessary may make an order in the Form in the Schedule that from a date to be stated in the order, the person do reside in such area as may be specified in the order or do not enter into such area or areas as may be so specified.

(iii) An order made under subsection (ii) may be for the life of the person to whom it relates or for a term to be stated in the order, and may at any time be revoked, cancelled, or varied by the Minister.

[6] The plaintiff being dissatisfied with the second order of the Deputy Minister issued on 23 March 2007 pursuant to s 2(ii) of the 1933 Act which had restricted him to Dungun has applied for judicial review through this originating summons filed at the High Court, Ipoh on 3 May 2007 to quash the second order dated 23 March 2007 under the Restricted Residence Act 1933 against him.

[7] By the originating summons dated 3 May 2007 (encl 2), which is supported by an affidavit affirmed on 9 April 2007 by the plaintiff (encl 3), the plaintiff has named the following as the defendants:

(1) Timbalan Menteri Keselamatan Dalam Negeri, Malaysia (first defendant);

(2) Penguasa, Penjara Kluang, Johor (second defendant);

(3) Ketua Polis Daerah,Kluang, Johor (third defendant);

(4) Ketua Polis Negara (fourth defendant);

(5) Kerajaan Malaysia (fifth defendant).

[8] By this originating summons, the plaintiff has applied for the following orders:

(1) Bahawa penyekatan plaintif ke kawasan Mukim Kuala Dungun, Daerah Dungun, Terengganu di atas kuasa perintah di bawah s 2(ii) Akta Kediaman Terhad 1933 di bawah tangan defendan pertama bertarikh 23 Mac 2007 untuk tempoh tiga tahun itu adalah batal dan tidak sah dan tidak mempunyai kesan di bawah undang-undang;

(2) Bahawa penyekatan plaintif sebagaimana yang dinyatakan dalam perenggan 1 di atas adalah menyalahi undang-undang, sama sekali tidak dibenarkan dan tidak mengikuti undang-undang dan bercanggahan dengan Perkara 5 Perlembagaan Persekutuan;

(3) Bahawa mahkamah membuat perintah-perintah konsekuential ke atas perenggan 1 dan 2 di atas;

(4) Kos; dan

(5) Relief-relief lain yang seterusnya yang mahkamah ini fikir sesuai wajar dan suaimanfaat.

[9] In the instant case, there are three affidavits on behalf of the plaintiff and 11 affidavits in reply for the defendants filed in this court.

[10] At the hearing of the originating summons before this court on 3 October 2007 and 16 October 2007, learned counsel for the plaintiff has, inter alia, submitted which briefly is as follows:

(i) The act of the first defendant was mala fide and contravenes s 2(i) of the 1933 Act. Lampiran A basically states that the plaintiff is a promoter of illegal character lottery (taking bets) ('perjudian bookie catit taruh haram (bookie kuda haram)') and that his activities were not beneficial or conducive to the maintenance of peace and public order in the vicinity of the district of Kluang, Johor from the year 2000 until now ie, 6 March 2007;

(ii) However, there is an affidavit affirmed by the plaintiff himself and his daughter stating that from 24 February 2007 till 9 March 2007, the plaintiff did not reside in Kluang but he was residing in Selangor. Therefore, what does the word 'sekarang' in the first order mean and it is vague and uncertain;

(iii) The failure of the third defendant to hand over a copy of the first order and lampiran A on 9 March 2007 and the failure of the defendant to accord to the plaintiff the right to effectually appeal has deprived the plaintiff the right to be heard. Lampiran A was not handed to the plaintiff on 9 March 2007 who had acknowledged receipt of the same on the same day but in actual fact, it was retained by the police and was only handed to the plaintiff on 24 March 2007 ie after the expiry of the 14 days period allowed for the appeal and after the second order was issued on 23 March 2007;

(iv) The prison authority in Kluang prison had failed to inform the plaintiff of his rights and that the detention of the plaintiff in Kluang prison was for an unreasonable period as the plaintiff was detained for 14 days from the time the first order was issued;

(v) The defendant had failed to comply with s 2(i) of the 1933 Act by failing to issue Borang B being the Warrant of Detention under the schedule of the 1933 Act;

(vi) The second order issued by the Deputy Minister was in breach of the rules of natural justice and the constitutional guarantee and the second order ought to be quashed.

[11] On the other hand, learned federal counsel for the defendants has submitted briefly as follows:

(i) The first defendant has perused and directed his mind to all written information received by him and there should be no reason why the written information should not be inclusive of the period till 6 March 2007;

(ii) The arresting officer Chief Inspector You Swee Leong had informed the plaintiff the grounds of his arrest and the plaintiff was also informed of his right to appeal to the Deputy Minister within 14 days from the receipt of the first order. In fact, the learned Federal Counsel had contended that the rights of the plaintiff had been explained twice. Despite having informed the plaintiff of his rights as stated above, the plaintiff did not forward any appeal to the Deputy Minister;

(iii) However, learned Federal Counsel had conceded that the warrant to arrest and detention including lampiran A was required by the police for administrative and documentation purposes and this was also confirmed by Chief Inspector You Swee Leong (see affidavit affirmed on 21 June 2007, encl 5) and that it was only handed to the plaintiff on 24 March 2007. Nevertheless, he submitted that if the plaintiff wishes to forward his appeal, he could have asked from the police through the prison authorities for the first order and lampiran A;

(iv) There is no obligation provided under the 1933 Act for the prison authorities to inform the plaintiff of his right. As to the gap of 14 days from the date of his arrest until the second order was issued was to enable the Deputy Minister to peruse all documents and among others, to consider if there was any appeal from the plaintiff;

(v) Borang B is only issued when the person named in the first order is already in prison;

(vi) Therefore, the originating summons ought to be dismissed with costs.

[12] In reply, learned counsel for the plaintiff had submitted, inter alia, and briefly is as follows:

(i) The plaintiff was not informed that the first order and lampiran A were kept by the police and that if he wanted to appeal, he could request for the same from the police. In other words, the contention of the learned counsel for the plaintiff was that there was a violation of the rules of natural justice;

(ii) There was procedural non-compliance and that the plaintiff was not able to make an effective representation without the first order and lampiran A in his possession;

(iii) The first defendant had failed to produce evidence that there was an investigation carried out by the police in reference to the charge against the plaintiff and whether there was in fact an investigation report which was forwarded to the first defendant ('Deputy Minister') and if there was an investigation, when was the investigation report being forwarded to the Deputy Minister.

DECISION

[13] This court finds that amongst the grounds raised by learned counsel for the plaintiff, there are basically two principle assertions which require serious consideration.

(i) *First*, the decision making process has been conducted in violation of the rules of natural justice and the Federal Constitution; and;

(ii) *Secondly*, the plaintiff has been deprived of his right to appeal as provided in lampiran A which was granted to him by the Deputy Minister and his constitutional rights to be heard effectively. The particular paragraph in lampiran A which had granted the plaintiff the right to appeal states as follows:

> Jika kamu ingin membuat apa-apa rayuan untuk pertimbangan saya, kamu boleh berbuat demikian dalam masa empat belas hari selepas menerima alasan-alasan ini.

[14] In deciding the two issues, this court has to refer to the enabling appeal provision as stated in para 2 of lampiran A which must be read together with arts 151(1)(a) and 5(3) of the Federal Constitution ('Federal Constitution'). Article 5(3) of the Federal Constitution states as follows:

(1) No person shall be deprived of his life or personal liberty saves in accordance with law.

(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice

(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:

Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this clause shall be deemed to have been an integral part of this Article as from Merdeka Day.

Article 151(1)(a) of the Federal Constitution states as follows:

(1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention —

(a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, *and shall give him the opportunity of making representations against the order as soon as may be*;

(3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

(Emphasis added.)

[15] In the instant case, Chief Inspector You Swee Leong ('the police') who had arrested the plaintiff did not hand lampiran A to the plaintiff on 9 March 2007 after having obtained his signature to acknowledge receipt. The first order together with lampiran A was only handed to the plaintiff on the fourteenth day ie on 24 March 2007 after the Deputy Minister had issued the second and final order dated 23 March 2007 to restrict the plaintiff to Dungun, Terengganu and before he was taken from Kluang prison to Dungun. This unauthorised tactical manoeuvre of not handing the first order with lampiran A to the plaintiff at the time when he was asked to acknowledge receipt of the same on 9 March 2007 and handing the same to him at the expiry of the 14 days is a diversion or an unauthorised departure which had deprived the plaintiff of his right to be heard as accorded to him by the Deputy Minister to appeal to him as contained in lampiran A. The conduct of the police constituted a serious departure from the principles of natural justice and his constitutional right of making representations against the first order and to effectively controvert, contradict or explain the charge against him. In interpreting whether merely giving an opportunity to appeal was adequate to have complied with the rules of natural justice and art 151(1)(a) of the Federal Constitution, a realistic view has to be taken by

A the court in its determination. Indeed, the court must consider whether the plaintiff who was to appeal within 14 days was in fact able to really and effectually controvert, contradict or explain the allegation against him as the opportunity to be heard must be real and effective (see *R v Archbishop of Canterbury* [1944] 1 All ER 179). The scope of the duty imposed by the rules
B of natural justice is basically to act fairly and no person should be condemned unheard as it happened in the instant case. The modus operandi resorted to by the police is not only an abuse of the process but arguably tantamounts to frustrate and hamper the opportunity granted to the plaintiff by the Deputy Minister to appeal to him within 14 days.
C

[16] Failure to supply the copy of the first order together with lampiran A which the plaintiff is entitle to enable him to make the representation to the Deputy Minister amounts to violation and strikes at the core of the rules of
D natural justice. Where the Deputy Minister who has the statutory power to restrict a person of his personal liberty under the 1933 Act has in fact granted an opportunity to the person to be heard and to make representations, the police cannot then unilaterally or arbitrarily strip him of the right and the opportunity given to him to appeal within 14 days by unlawful means and
E subject him to the mercy of the police as it happened in the instant case. The unauthorised tactical manoeuvre to retain the first order and lampiran A dated 6 March 2007 which provides the grounds and the provision to appeal within 14 days to the Deputy Minister, especially after having obtained his signature to have acknowledged the same on 9 March 2007 and handing over
F to the plaintiff after the expiry of the 14 days period to appeal is over on 24 March 2007 appears to be a calculated and unauthorised tactical manoeuvre and a serious transgression to the rights of the plaintiff and is not in any way trivial or technical in nature. In matters which concern the plaintiff's personal liberty; he is even entitled to avail himself from any
G technical defect which may invalidate the order which had deprived him of that liberty, (see *Ex parte Johannes Choeldi & Ors* [1960] MLJ 184 at p 186 followed in *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri* [1994] 3 MLJ 285). However, the complaint raised on behalf of the plaintiff as to deprivation of his right of appeal is not a trivial matter but has grave
H consequences. Merely to show the first order together with lampiran A to the plaintiff or bringing to his notice the charges and informing him of his right of appeal and at the same time precluding him from retaining the documents, cannot be said to have enabled the plaintiff effectively to deal with its contents and allegations but rather a calculated act to deprive him of the right
I to be heard.

[17] In the instance case, as stated above, the police after obtaining the signature of the plaintiff as having acknowledge receipt of the first order together with lampiran A did not hand the first order with lampiran A to the

plaintiff on 9 March 2007 and this has been graciously conceded by learned federal counsel for the defendants. In other words, the signature of the plaintiff was obtained as having acknowledged receipt of the first order together with lampiran A but in actual fact, as stated above, it was conceded by the learned federal counsel that it was not handed to the plaintiff in order for him to make representation to the Deputy Minister. As conceded, the first order together with lampiran A was only handed to the plaintiff when the second order dated 23 March 2007 was issued by the Deputy Minister who ordered the plaintiff to be restricted to Dungun, bearing in mind that the plaintiff was given only 14 days from the date of receipt of the grounds as provided in para 2 of lampiran A to appeal to the Deputy Minister. The fact that the first order and lampiran A was only handed to the plaintiff after the expiry of the 14 days clearly shows that the plaintiff could not have exercised his right of appeal within the 14 days period which was granted to him by the Deputy Minister. The only reason advanced by learned federal counsel for the defendants for not having handed the first order together with lampiran A on 9 March 2007 to the plaintiff which contained the grounds of his arrest and detention and the provision to appeal is because, the documents were required for administrative and documentation purposes by the police, and this same reason has been confirmed by Chief Inspector You Swee Leong in his affidavit (encl 5). This court is of the considered view that the reason given for not having handed lampiran A to the plaintiff on the grounds of administrative convenience is unacceptable, unforgivable and inexcusable as it is so fundamental and must be condemned as it has virtually and practically deprived the plaintiff of his right to appeal although it appears on record that he has acknowledged receipt of the same. In fact, by the affidavit in reply (encl 5), Chief Inspector You Swee Leong did not answer directly the particular complaint of the plaintiff that the first order and lampiran A was not handed to him on 9 March 2007 but was only handed on 24 March 2007 and instead diverted his reply and was evasive by stating that the first order and lampiran A was required by the police for administrative and documentation purposes. On one hand, the defendants have stated that the plaintiff was informed of his right to appeal within 14 days against the allegations as contained in lampiran A which is attached to the first order. On the other hand, the first order together with lampiran A was not handed to the plaintiff at the time of his arrest on 9 March 2007 although conceded, he was asked to sign as having acknowledged receipt of both the documents but however, it was retained by the police and handed to the plaintiff only on the expiry of the 14 days ie, on 24 March 2007 at the time when the second order which had restricted him to Dungun was already issued and this act seemed to be a material contradiction in terms.

[18] As the plaintiff was deprived to challenge the facts and the information supplied to the Deputy Minister and the scope to challenge is on limited grounds, for issuing the first order and as contained in lampiran A and the

A fact that his personal liberty is restricted without a trial, it is of the highest importance that he is not only informed of his right to appeal but that right must include the right to be effectively heard and he must also be informed of the appeal procedures for putting forward his own case. The right to be heard before being condemned is one of the pillars of individual liberty.
B In *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, Byles J said:

> Although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature, (see also *Assa Singh v Menteri Besar, Johore* [1969] 2 MLJ 30 pp 33, 35, 40, 44 and
C 45).

[19] In this context, it is important to state that and in certain cases, the opportunity to be heard must also be tailored to the capacity and
D circumstances of those who want to be heard especially, those who lack the educational attainment necessary to write effectively and who are unable to obtain professional assistance (see *Goldsberg v Kelly* [1970] 397 US 254, pp 268–269; *Richard v Wright* [1972] 405 US 208, pp 215–216 per Brennan J).

E

[20] This court is of the considered view that the purpose of the 1933 Act which empowers the Deputy Minister to make a provisional order, ie the first order, before the final order (the second order) is issued was obviously intended and envisages consideration of an appeal, representation or
F objection from the person detained with the view to deciding whether or not to issue the second order. In fact, the plaintiff must have notice of what he is being accused off. He must have an opportunity of being heard and the decision must be honestly arrived upon a full and fair opportunity of being heard (Bowen LJ in *Leeson v General Council of Medical Education and*
G *Registration* (1889) 43 Ch D 366 at p 383). A government which reveals in secrecy … not only acts against democratic decency but busies itself with its own burial (per Krishna Iyer in *Maneka Gandhi v Union of India* AIR 1978 SC 597). Therefore, the right to know the truth and to be heard is paramount as the right to property and personal rights.

H

[21] In the particular circumstances of this case, it has been shown that there has in fact, been contravention of the plaintiff's right to be heard or his right to make representation within the 14 days before the Deputy Minister decided to issue the second order. It is important to stress that where the right
I or personal liberty of a person is prejudicially affected by an order made by an authority as in the instant case, the Deputy Minister, pursuant to a statutory power, that order has to be issued in accordance with all fairness as fairness is justice and it is not confined to the courts. Any arbitrary exercise of discretionary power would be disdained by this court. The police who were

directed to execute the first order of the Deputy Minister must act fairly, justly, reasonably and impartially (see *DK Yadav v JMA Industry* AIR 1995 SCW). In the instant case, the plaintiff was granted an opportunity to state his case within 14 days but that opportunity was taken away by the police through unlawful means. To wait for the 14 days period to be over and then handing the first order together with copy of lampiran A to the plaintiff after the second order under s 2(ii) of the 1933 Act had been issued is meaningless and appears to be tainted with bad faith as the appeal process became ineffective (see *Russell v Duke of Norfolk* [1949] 1 All ER 109; *Rattan Lal Sharma v Managing Committee* AIR 1993 SC 2115; *Leary v National Union of Vehicle Builder* [1971] 1 Ch 34).

[22] Whatever action that is taken and where the decision affects the personal liberty or right of a subject and curtails the full enjoyment of some freedom of the individual, there must be strict compliance with the constitutional guarantee accorded to the subject, in the instant case, the plaintiff, before the second order was issued and nothing unfair should be done in the matter and this is a powerful argument raised by learned counsel for the plaintiff. In fact, one of the most fundamental of all rights is the right to liberty (see *Bonaker v Evans* (1850) 16 QB 162). The practical question is, whether or not the plaintiff's right to appeal has been taken away by unlawful means. In order to determine this fundamental requirement, the court must be satisfied that the plaintiff against whom the restriction order was proposed had a fair chance and substantial opportunity of convincing the authority, who has proposed to take action against him, that the grounds on which the action is proposed are either non-existent or even if they exist, it does not justify the proposed action which ultimately affect his personal liability which no doubt will assist the decision maker, in the instant case, the Deputy Minister to a fair conclusion on the question (see *Sagarmal Spinning & Weaving Mills Ltd v Central Board of Direct Taxes* [1992] 83 ITR 130; *Fedco (P) Ltd v SN Bilgrami* AIR 1960 SC 415; *R v Archbishop of Canterbury* [1944] 1 All ER 179; [1944] 1 KB 282). Finally, the decision maker must ensure and satisfy himself that the basic principle of natural justice and procedural fairness had been strictly adhered at the time of making this decision (see *R v Liverpool Corporation; ex p Taxi Owners Associates* [1972] 2 QB 299; *Bren v Almagamated Engineering Union* [1971] 2 QB 175).

[23] In examining the acts of individual or of the executive authority or the police, carried out under the act of legislature, in the instant case, the 1933 Act, it is the duty of this court to point out the loopholes or breaches only with the object that, if so desired, the authority may put matters right. In the particular sets of facts of the instant case, the fashion in which the process was carried out by the police appears to be entirely improper, inappropriate and incorrect which had deprived the plaintiff of his right to be heard resulting

the second order to be void and ineffectual to bind the plaintiff as it has injured a constitutionally guaranteed right (see *Navabkhan Abbas Khan v State of Gujurat* 1974 2 SCC 12; AIR 1974 SC 1471). This court is therefore endowed with the function of protecting and safeguarding the right as guaranteed by the Constitution against encroachment by the executive where unfair procedure is resorted to in the deprivation of a personal liberty in which event, the decision and the procedure are liable to be struck down. In fact, it is an essential principle of natural justice that apart from giving notice of the case or the charge where a person has to meet where his right and liberty are affected, he must be given an opportunity to make representations and to explain the allegation made against him. It is a deep rooted principle of the law, that before any person is condemned, he must be afforded an adequate opportunity of being heard unless excluded by an express statutory provision which however, does not apply in the instant case. In other words, there must be a real and effective opportunity given to the plaintiff for meeting every relevant allegation which has been made against him. In the instant case, the police had merely paid lip service to the principles of natural justice which has hither imposed a legal obligation and not simply a moral duty. Mere lip service provided to the principles of natural justice will not meet or fulfill the requirement and opportunity granted to the plaintiff to appeal and in such circumstances, it would tantamount to nothing but a mockery to the principles of natural justice riddled with administrative convenience and reduce it to a shadow. Indeed, the principle of audi alteram partam which is an essential element of natural justice has been elevated to a status of constitutional right (see art 151(1)(a) of the Federal Constitution; *Assa Singh v Menteri Besar Johor* [1969] 2 MLJ 30 at pp 33, 35, 40 and 45). The right to life must not only include the right to freedom but surely must include the right to be heard before being condemned (see *JP Berthelsen v Director General of Immigration Malaysia & Ors* [1987] 1 MLJ 134).

[24] In *Toy Centre Agencies Pty Ltd v Spencer* (1983) 4 ALR 351, Lockhart J at p 357 said:

> There are no standards of universal application to very kind of tribunal, be it administrative or quasi judicial (that 'convenient though inexact expression: per Kitto J in *Mobil Oil Australia Pty Ltd v FC of T* (1963) 113 CLR 475 at p 501). The application of the rules of natural justice must depend on the nature or subject matter of the inquiry; the extent to which the decision may affect the rights, property or legitimate expectations of any person; specific rules governing the procedures of the tribunal; the circumstances of the particular case and so forth.
>
> I do not derive much assistance from attempts to define the rules of natural justice which have been made from time to time. The real difficulty in this case, as in most cases, is to give content to the applicable rules of natural justice or standards of fairness.

[25] In *Wiseman v Borneman* [1971] AC 299, Lord Guest at p 310 (see *Pearlberg v Varty (Inspector of Taxes)* [1972] 1 WLR 534 at p 547:

> It is reasonably clear on the authorities that where a statutory tribunal has been set up to decide final questions affecting parties' right and duties, if the statute is silent upon the question, the courts will imply the statutory provision a rule that the principles of natural justice should be applied. This implication will be made upon the basis that Parliament is not to be presumed to take away parties' right without giving them an opportunity of being heard in their interest. In other words, Parliament is not to be presumed to act unfairly. The dictum of Byles J in *Cooper v Wandsworth Board of Works* 14 CNBS 180, p 194, is clear to this effect and has been followed in many subsequent cases.

[26] In *Shalini Soni v Union of India* AIR 1981 SC 431, the Supreme Court said at p 432 as follows:

> It is unwritten rule of the law, constitutional and administrative that whenever a decision making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and remote. Where there is further an express statutory obligation to communicate not merely the decision but also the grounds on which the decision is founded, it is a necessary corollary that the grounds communicated, that is, the grounds so made known, should be seen to pertain to pertinent and proximate matters and should comprise all the constituent facts and materials that went in to make up the mind of the statutory functionary and not merely inferential conclusions. The decision to detain a person depends on the subjective satisfaction of the detaining authority. The Constitution and the statute cast a duty on the detaining authority to communicate the grounds of detention to the detenu. Therefore, the grounds communicated to the detenu must reveal the whole of the factual material considered by the detaining authority and not merely the inferences of fact arrived at by the detaining authority; secondly, an opportunity to make a representation against the order of detention contemplated by art 22(5) necessarily implies that the detenu is informed of all that has been taken into account against him in arriving at the decision to detain him. It means that the detenu is to be informed not merely of the inferences of fact but all the factual materials which have led to the inferences of fact. If the detenu is not to be so informed the opportunity so solemnly guaranteed by the Constitution becomes reduce to an exercise in futility.

[27] In *Russell v Duke of Norfolk* [1949] All ER 109 Tucker LJ at p 118 said:

> There are, in my view, no words which are of universal application to very kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of

natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.

[28] In *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245, Lee Hun Hoe (CJ Borneo) at p 251 said:

> In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law the detention is bad and the person detained is entitled to be released forthwith.

[29] In *Aw Ngoh Leang v Inspector General of Police & Ors* [1993] 1 MLJ 65, the appellant was detained under the Emergency (Public Order and Prevention of Crime) Ordinance 1969. When he was detained, only one copy of the prescribed form of making representations against the detention was given to him, contrary to r 3 of the Public Order and Prevention of Crime (Procedure) Rules 1972 which said that two copies should be given to the detained person (or if the detained person states that he intends to engage an advocate to represent him, three copies of Form I in the Schedule) should have been handed to him. It was not disputed that only one form of Form I was given to the person detained and the appellant in that case had complained that there was non-compliance of r 3(2) which prejudiced him and resulted in injustice. The High Court dismissed the application of the detained person on the grounds of the maxim *de minimis non curat lex* (the law does not concern itself with trifles). On appeal by the detained person, LC Vohrah J (as he then was) for the Supreme Court in allowing the appeal said at p 67:

> Before us counsel for the appellant cited the case of *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1991] 3 MLJ 28 which involved a detention under the same provisions of the law and in similar circumstances whereunder a police officer had provided the detainee only one copy of Form 1. In a well-considered decision of the High Court on the very point, Edgar Joseph Jr J (as he then was), in allowing the detainee's application for habeas corpus, had this to say at pp 29–30:
>
> > There had been a consistent current of judicial opinion in our courts, including the latest decisions of the Supreme Court, which indicate that when confronted with the problem of interpreting powers of preventive detention, they have interpreted them strictly so as to require that the provisions of the relevant statute are rigidly and meticulously complied with (see for example, *Tan Hoon Seng v Minister for Home Affairs, Malaysia & Anor* [1990] 1 MLJ 171; *Rajoo s/o*

Ramasamy v Inspector General of Police & Ors [1990] 2 MLJ 87 and a series of 11 recent appeals heard together, the first being *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1990] 2 MLJ 297, in all of which the detainee succeeded on purely procedural or technical grounds).

In my view, in considering the question posed by this application a distinction has to be made between procedural requirements which are of direct relevance to the detention order and those which are not. To put it another way, a distinction must be drawn between procedural requirements which are 'directory' only and those which are 'mandatory'. The principle involved is simple enough to state but its application to specific cases is often not free from difficulty as has been aptly put by SA de Smith in his book, *Judicial Review*, at p 142: The law relating to the effect of failure to comply with procedural requirements resembles an inextricable tangle of loose ends.

and at p 31:

> ... Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as a whole and provided no prejudice ensues; and when the legislature does not itself state which is which; judges must determine the matter, and, exercising a nice discrimination, sort out one class from the other along broad based common sense lines ...
>
> It is manifestly clear that the requirements of r 3 for the delivery to a detainee of the requisite number of copies of Form 1 wherein appear the grounds for his detention are not just a concession but a *right* designed *to enable and not just to assist* him in making representations to the Advisory Board which has the power to recommend his release to the Yang di Pertuan Agong. If he does not intend to engage counsel then he *shall* be provided with *two* copies of Form 1 — one to be sent to the Secretary of the Advisory Board and the other to be retained by him for his reference, so that if and when he appears before the Advisory Board he will be in a position to refer to it, and if he so wishes, to make oral supplementation. Without his own copy, therefore, he might well be at a disadvantage in proceedings before the Advisory Board.
>
> If, on the other hand, a detainee intends engaging an advocate, it goes without saying that the advocate too must have a copy of Form 1 to enable him to prepare a detainee's case; hence the requirement by the bracketed words in r 3(2) that a detainee *shall* be provided with three copies of Form 1 should he intend to engage an advocate to represent him.

We are of the view that the above observations of the learned judge reflect the correct interpretation of the mandatory nature of the relevant provisions as they concern the right of a person detained without trial to seek his own release by a procedure for the making of representations requiring the filling-up of a minimum of two forms and of one more if the detainee intends to be represented before the Advisory Board. Any disobedience of the mandatory requirements for the protection of this right would vitiate any order of detention made even if no

real prejudice has ensued to the detainee. The maxim *de minimis non curat lex* can have no application in such a case as a breach of a mandatory requirement can never be a trifling matter when it involves the civil liberty of an individual.

[30] It is clear from the case in *Aw Ngoh Leang v Inspector General of Police & Ors* [1993] 1 MLJ 65 as to the importance for the police officer to provide the person detained with the two copies of the Form I (or if the detained person states that he intends to engage an advocate to represent him, three copies of Form 1) to enable him to make representation effectively and this duty and obligation is imposed on the police to serve the documents to the person detained. Whereas in the instant case, the plaintiff is in a worst position, whereby he was not only deprived of his right to make the representations to the Deputy Minister within 14 days where he was not even handed the first order including lampiran A which contains the charges against him and the provision to appeal within 14 days but there is also no set of procedures for appeal expressed in the 1933 Act for the person detained to appeal or for the officer to assist him to forward the appeal to the Deputy Minister as it is provided in the Emergency (Public Order and Prevention of Crime) Ordinance 1969. In the circumstances, it is obvious and surely it was important for the police officer to have handed the first order including lampiran A to the plaintiff to enable him to either consult a counsel or to seek the assistance of the prison authority to assist him to prepare a written appeal to the Deputy Minister within the 14 days. This could only have been done if the plaintiff had in his possession all the documents issued by the Deputy Minister by the first order and which was intended to be served on the plaintiff.

[31] This court is of the view that prima facie, where notices containing the charge is not effectively served on the plaintiff, ie is not received by the intended recipient the position corresponds to that in which no notice is given, and the order to restrict him under the 1933 Act will in consequence be invalidated. The right of a man to his liberty as enshrined in the Federal Constitution is just as important to him if not more important than his rights to property. Bodies or tribunals or public authority and executive who exercise sole discretion and who are vested with powers in an important sphere of human activity with the power of depriving a man of his liberty or livelihood, must act fairly and in accordance with the elementary rules of natural justice. They must not condemn a man without giving him an opportunity to be effectively heard or make an effective representation in his own defence and any breach of the rules of natural justice would make the order in the instant case ie the restriction order against the plaintiff's free movement ultra vires and invalid (see *Abbott v Sullivan* [1952] 1 KB 189 at p 198; *AR Antulay v RS Nayak* 1988 2 SCC 602; *Ravi S Naik v Union of India* [1994] Supp (2) SCC 641).

[32] In *Chin Wee Yee v Menteri Dalam Negeri & Anor* [1997] 5 MLJ 585, the applicant was served with the warrant of arrest and detention order and the grounds of arrest, he had submitted his appeal. His appeal was received and the same was considered by the Deputy Minister before the second order was issued. In that case, Elizabeth Chapman JC said at p 588:

> In the present case, when the warrant of arrest and detention order were served on the applicant together with the ground of arrest, he had submitted his appeal later through his counsel. From the Deputy Minister's affidavit affirmed on 27 April 1996, the applicant's appeal letter had been received (para 7) and he was satisfied that further enquiry was not necessary (see para 8) an order was then made under s 2(ii) of the Act (see paras 9 and 10) after taking into consideration the appellant's appeal letter (see para 11). The requirements under s 2(1) of the Act had been considered by the Deputy Minister (see paras 5 and 6).

[33] In *S Selvaraja T Singarathevar v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1997] 2 CLJ Supp 275; [1997] MLJU 476, His Lordship Vincent Ng J (as he then was) said at p 280:

> And, as detention or restricted residence under the Internal Security Act 1960, the Emergency (Public Order and Prevention of Crime) Ordinance 1969 and the Dangerous Drugs (Special Preventive Measures) Act 1985 all involve the enforced detention or incarceration or restriction of a subject without trial or semblance of a trial, the approaches and decided principles established by the courts in earlier cases are inter-applicable in all such cases of detention or restriction that are empowered under the said various enabling statutes.
>
> The Minister is a public decision maker upon whom a power or discretion is vested by Parliament.
>
> As trustee of that power, an obligation is reposed in him to exercise it reasonably and within the ambit of the relevant statute that confers the power or discretion.
>
> Thus, 'when his exercise of the discretion is questioned, it is incumbent upon him to meet the challenge by adducing relevant and admissible evidence' (see *Datuk Bandar Kuala Lumpur v Zain Azahari Zainal Abidin* [1997] 2 MLJ 17). Although it is trite law that the issue of the subjective satisfaction or the sufficiency of the satisfaction of the Minister is not justiciable, (see *Karam Singh v Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129), yet, as preventive detention is a very serious affront to personal liberty, when certain procedures employed (as enjoined in s 11C of the Act) by the Minister is prima facie irregular or out of the ordinary, an explanation falls due to the court to satisfy the court that the discretion to detain was exercised in accordance with the law under consideration.

[34] In *Smt Indira Nehru Gandhi v Shri Raj Narain* AIR 1975 SC 2299, KK Mathhew J at p 2398 observed:

> If a power is given to a body without specifying that the rules of natural justice should be observed in exercising it, the nature of the power would call for its observance.

[35] In *Twist v Randwick Municipal Council* (1976) 12 ALR 379, Barwick CJ at p 382 said:

> The court in the protection of the citizen and in the provision of natural justice may declare that statutory action affecting the person or property of the citizen without affording the citizen an opportunity to be heard before he or his property is affected is ineffective. The court will approach the construction of the statute with a presumption that the legislature does not intend to deny natural justice to the citizen. Where the legislation is silent on the matter, the court may presume that the legislature has left it to the courts to prescribe and enforce the appropriate procedure to ensure natural justice.

[36] In *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri* [1994] 3 MLJ 285, Gunn Chit Tuan CJ (Malaya), said (at p 294):

> Laws which deprive the subjects of their rights to personal liberty are subject to strict construction in the same way as penal laws.

[37] In *Tan Yap Seng v Ketua Polis Negara & 2 Ors* [1991] 2 CLJ 1400, Edgar Joseph Jr J at p 1402 said:

> In a matter concerning the liberty of the subject-always a priceless asset-the court should walk very wearily.

[38] In *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Cheow Siong Chin* [1988] 1 MLJ 432; Abdul Hamid CJ (Malaya) (as the then was) at pp 433–444 said:

> The Enactment is a pre-Merdeka law but it was settled in *Assa Singh v Menteri Besar, Johore* [1969] 2 MLJ 30 that the Enactment is valid but must be read with such modifications as may be necessary to bring it into accord with the provisions of the Constitution in accordance with art 162(6) of the Constitution. The Enactment empowers the executive to exile any person to any part of the Federation. Section 2 of the Enactment provides the various steps to be taken by the executive. As pointed by Suffian FJ (as he then was) in *Assa Singh*, the Minister first considers written information and makes or causes to be made such enquiry as he may deem necessary. If it appears to him that there are reasonable grounds for believing any person is required to reside in any particular district, he then issues an order for the arrest and detention of such person. After the person is arrested and detained under the first order, the Minister then after such enquiry as he may deem necessary makes an order under s 2(ii) of the Enactment that from a date to be stated in such order the person would be required to reside in such district or mukim as may be specified in the order.
>
> It would seem agreed in all the main judgments in *Assa Singh* that the arrest of a person under s 2(i) is no different from the arrest of a person who is alleged to have committed a crime and that his detention pending an order under s 2(ii) of the

Enactment is no different from the remand in custody of an arrested person pending trial. What is in issue is whether an enquiry must be held before the second order under s 2(ii) is made against the person. Suffian FJ came down with no uncertain terms that an enquiry after the arrest is optional (p 37). Gill FJ dealt with the question whether there should be an enquiry before they issue a warrant to arrest a person under s. 2(i) of the Enactment but remained silent on s 2(ii) of the Enactment (p 44). In any case this question was not an issue before the Federal Court then. However Ong CJ in what was actually obiter said in his judgment that 'the learned Solicitor-General concedes, I believe, that the applicant is entitled to an enquiry at which he would have full opportunity of making representations' (at p 36). This statement has actually created the uncertainty.

After the amendment to cl 4 of art 5 of the Constitution by Act A354 which took effect from 27 August 1976, a person arrested under the Enactment no longer has the protection of cl 4 of art 5 of the Constitution relating to production without unreasonable delay before a Magistrate. But he still enjoys the protection under cl 1 and cl 3 of art 5 of the Constitution, ie deprivation of his life or liberty only in accordance with law and his right to be informed of the grounds of his arrest and be defended by counsel of his choice. The protection under cl 3 is the relevant one here. Clause 3 of art 5 of the Constitution reads:

> (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

It can be observed from the records that the respondent was informed of the grounds of his arrest and detention. It was also not disputed that the respondent did in fact consult a legal practitioner who made representations on his behalf. In other words, he was afforded the opportunity of being heard.

In our judgment, an enquiry by the Deputy Minister before he makes an order under s 2(ii) of the Enactment is optional and for the purpose only of satisfying himself that there are reasonable grounds for believing that the respondent should have his residence restricted. The respondent is not entitled as of right to an enquiry before an order under s 2(ii) of the Enactment is issued against him. It is also clear that in this particular case the requirements of cl 3 of art 5 of the Constitution have been complied with.

As regards the cross-appeal, it is to be observed that the objection of the Enactment is to maintain public order. The Enactment is a pre-Merdeka law which has proven its usefulness. On the point raised the learned judge said in his judgment:

> The Enactment indeed gives drastic powers to the executive to exile any person who wears a grey tie because the executive does not like him to wear a grey tie. It was, however, argued that as the allegation against the plaintiff is that of cheating under the Penal Code, he should be prosecuted in the criminal courts and therefore the Enactment should not be used against him. It is not for the court to fathom the thoughts of the Minister. The Enactment does give him the power to restrict the plaintiff on the grounds stated because the ground stated is reasonable, that is to say, a cheat should not be allowed to cheat innocent people. It would not be a reasonable ground, if the Minister had stated that the order was

made because the plaintiff wore a grey tie. I accordingly hold that the grounds for restricted residence in the instant case are within the scope, ambit and purview of the Enactment.

[39] The duty of the court is to protect the liberty of the individual in accordance with law. However, distasteful and undesirable the character of the detenu maybe, it is still the duty of the court to construe the law according to accepted principles of interpretation. Further, preventive detention which includes the second order given under the 1933 Act is a very serious invasion of personal liberty. Certain safeguards are provided by law for the protection of the subject and must be followed scrupulously. Where statutory requirements have to be complied with there must be strict compliance since it affects matters of such importance as the liberty of the subject (per Lee Hun Hoe CJ (Borneo) in *Re Tan Boon Liat @ Allen & Anor* [1977] 2 MLJ 108 at pp 110 and 113).

[40] No authority however high in position he or she may hold should attempt to strain the constitutional right granted under arts 5(3) and 151(1)(a) of the Federal Constitution. It is the duty of every branch of executive to abide and comply with the law and not to disregard it. The courts are the only defence of the liberty of the subject against departmental aggression. The provision of arts 5(3) and 151(1)(a) of the Federal Constitution and the wordings stated in the lampiran A which has granted an opportunity to the plaintiff to appeal to the Deputy Minister within 14 days cannot be treated as dead letters. In the light of the constitutional guarantee accorded to citizen, it is not open to the police to replace the same by some other unprofessional tactics of its own devising. On the facts in the instant case, the acts of the police, arguably tantamounts to an abuse of power where it is diverted from its true course so as to possibly achieve an improper end. This is a serious inexcusable and unforgivable matter which warrants immediate quashing of the second order. Indeed, fairness is what justice really is. The stream of justice has to be kept clear and pure and any authority who attempts to frustrate or undermine the opportunity as provided by the Federal Constitution which was guaranteed to the plaintiff for him to be heard and to make representation to the Deputy Minister must be dealt sternly and must be condemned as no person shall be deprived of his liberty save in accordance with the provision provided by law.

[41] Be it as it may, in all fairness to the Deputy Minister who had granted the plaintiff the opportunity to appeal within 14 days, there is a possibility that he may not have been aware or informed that the opportunity which he had granted to the plaintiff to appeal to him within 14 days was arbitrarily and unlawfully taken away by the police under his Ministry to whom the first order was addressed, namely, the Chief Police of Johor, the police officers and

the Director of Kluang Prison, thereby having deprived the plaintiff the opportunity to make the representation for him to consider before the second order was issued. In fact the Deputy Minister in the affidavit in reply affirmed on 21 June 2007 (encl 4), has stated that he should consider the appeal if there was any forwarded by the plaintiff before the second order was issued on 23 March 2007. This statement clearly envisages and warrants an opportunity for the plaintiff to be heard for the Deputy Minister to consider which obviously the plaintiff was unable to exercise before the second order was issued. This court is of the respectful view that any contravention by another agency or authority of the government against the right of appeal granted by the decision making authority, in the instant case the Deputy Minister read together with art 5(3) and guaranteed under art 151(1)(a) of the Federal Constitution would result in loggerheads. In fact, it gives the person aggrieved, in this case, the plaintiff whose liberty has been affected and has been substantially prejudiced, to seek redress in this court and the second order issued by the Deputy Minister pursuant to s 2(ii) of the 1933 Act would be vitiated. It is important to observe that the first order issued by the Deputy Minister to arrest and detain the plaintiff is a continuing process until the second order is issued or he is released without the second order being issued. It would therefore be undesirable for this court to split both the orders and to isolate them, as both are interlinked and one cannot exist without the other.

[42] It is not only important for this court as custodian of fairness to dispense justice fearlessly and impartially, but it is also equally important for learned federal counsel for the defendants to carry out his duty with certain sense of candour in presenting his case and act without fear or favour so as not to be seen as condoning any apparent and unauthorised tactical manoeuvre by either the decision making authority or the police whom he represents. This duty he owes to this court as an officer of the court. Indeed, this court is pleased to observe that both learned counsel for the plaintiff and learned federal counsel for the defendants had presented their case and assisted this court with certain standard of candour and professionalism in much of their arguments, and to the best of their professional ability and duty in order for this court to arrive at a just decision. In *R v Sussex Justices; ex p McCarthy* [1924] 1 KB 259, Lord Hewart CJ said:

> … a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.

[43] Judicial office is essentially a public trust and therefore must be carried out so as to be meaningful and effective. In this context, this court also wishes

to remind itself that the judicial oath which I have taken demands that this court administer justice without being deterred by the personalities named as parties in the originating summons as justice is older than the courts of law. Therefore, justice cannot be administered in the dark or secrecy. This is an inescapable judicial task and is not an exercise of whim or will.

[44] As to the complaint that the first defendant had failed to issue Borang B of 1933 Act being the warrant of detention, this court is in agreement with the submission of learned federal counsel for the defendants that Borang B does not apply to the facts in the instant case as it is issued to a person who is already detained in prison. In the instant case, Form A was correctly applied and issued ie warrant to arrest and detention of the plaintiff as the plaintiff was arrested at his home. Therefore, this ground of complaint with respect, is an irrelevant contention.

[45] As to the complaint that there was unreasonable delay of 14 days where the plaintiff was detained at the Kluang prison from the time the first order till the second order was issued,, this court is of the respectful view that it is without any merits and ought to be rejected, as the period of 14 days must be excluded, because the plaintiff was granted the period to make the representation to the Deputy Minister and that period cannot be taken against the defendant as being an unreasonable delay before the second order was issued (see *Su Yu Min v Ketua Polis Negeri & Ors* [2005] 6 MLJ 768). In any event, learned counsel had informed this court at the later part of the submission that the plaintiff is not proceeding with this ground.

[46] This court wish to stress that the substance or proof of the charges or the finding of fact by the Deputy Minister are not matters which is open to review by this court except on the decision making process (see *Edward v Bair* [1956] All ER 1436; *Public Prosecutor v Karpal Singh Ram Singh & Another Case* [1988] 1 CLJ Rep 249). This court has reminded itself that in judicial review cases, its task is to review the legality and not the merits of the administrative decisions. Therefore, the fact that from 24 February 2007 till 9 March 2007, the plaintiff was not residing in Kluang and that he was residing in Selangor as contended by learned counsel for the plaintiff are not matters for this court to determine and does not fall within the purview of judicial review by this court. This court also finds that the Deputy Minister has explained the word 'sekarang' by his affidavit affirmed on 22 August 2007 (encl 24) and the complaint that the word 'sekarang' is vague is no longer an issue and does not by itself invalidate the second order (see *Lee Kew Sang v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 2 MLJ 631). The principles on reviewing administrative decision are well settled and there should be no room for any turmoil to curb certainty in law and bang against

the weight of the settled principles (see *Clear Water Sanctuary Golf Management Bhd v Ketua Pengarah Perhubungan Perusahaan* [2007] 6 MLJ 446 at p 462).

[47] In *Noor Ashid bin Sakib v Ketua Polis Negara* [2002] 5 MLJ 22, His Lordship Jeffrey Tan J at pp 29–30 said:

> But other than to require the detaining authority to show that the detention is in the exercise of a valid legal power and that the provisions of the relevant statute have been rigidly and meticulously followed, it is not for the court to investigate into the sufficiency of the reasons or grounds relied on by the detaining authority for arrest and detention. For it is settled law, that whether there is reasonable cause to detain is a matter of opinion and policy which can only be taken by the executive (see *Karam Singh v Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 MLJ 129), that so long as the Minister is satisfied after considering all the information available to him, it is not for the court to question how or why he became so satisfied (*Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v Chua Teck* [1990] 1 MLJ 104), that the subjective satisfaction of the Minister of Home Affairs is not subject to judicial review (*Minister for Home Affairs Malaysia & Anor v Karpal Singh* [1988] 3 MLJ 29, that the fairness of the Minister's decision is subjective and that the court is only concerned with the procedural aspects of the exercise of executive discretion (*Theresa Lim Chin Chin & Ors v IGP* [1988] 2 MLJ 293), that courts do not sit in appeal against the decision of the Minister regarding the material on which the detention order was made (*Wong Fook Nyen v Timbalan Menteri Dalam Negeri & Ors* [1988] 2 CLJ 274; [1988] 2 CLJ (Rep) 543; *Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia* [1975] 2 MLJ 279), that courts do not examine the adequacy or truth of these materials and cannot interfere with the decision on the ground that if the court had examined them it would have come to a different conclusion (*Wong Fook Nyen v Timbalan Menteri Dalam Negeri Malaysia & 2 Ors*; *Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia*), and that the court cannot arrogate to itself the responsibility of judging the sufficiency or otherwise of the grounds (*Wong Fook Nyen v Timbalan Menteri Dalam Negeri Malaysia & 2 Ors*). (See *R Northumberland Compensation Appeal Tribunal; ex parte Shaw* [1952] 1 All ER 122 at p 133).

[48] In fact, this court has reminded itself that it does not overstep the limits of its judicial function and encroach into areas which are reserved to the executive and the legislature by the constitution and statute. Legislature, not the courts who makes the laws. On the other hand, it is the courts not the legislature or the executive which interpret the laws and decide cases. This court has also cautioned itself that judicial review will not apply as the cloak of an appeal in disguise. It exists to correct error of law where revealed on the face of an order or decision, or irregularity or absence of, or excess of jurisdiction, or procedural unfairness where shown. The control is exercised by removing an order or decision and thereby quashing it (per Morris LJ in *R v Northumberland Compensation Appeal Tribunal; ex parte Shaw* [1952] 1 All ER 122 at p 133). However, it is important to observe that the proper

constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is and act in the spirit of the court's order, (see *M v Homes Office & Anor* [1992] QB 270 at p 314 as per Nolan J).

[49] This court is satisfied that the plaintiff has succeeded in establishing that there has been a fundamental breach of the principles of the natural justice and art 151(1)(a) of the Federal Constitution where it was rightly and graciously conceded by learned federal counsel for the defendants to the effect that the police officer did not hand the first order together with the lampiran A to the plaintiff on 9 March 2007 and that it was only handed on 24 March 2007 as it was required for administrative and documentation purposes. This unauthorised act, no doubt, in the court's view, has hampered and deprived the plaintiff from exercising his right to appeal to the Deputy Minister. However, upon being questioned by this court as to how the plaintiff is expected to make the written representation without the grounds in his possession to the Deputy Minister, learned federal counsel had submitted that the plaintiff could have asked for the said documents from the police. In this respect, it is important to observe that there is no evidence to substantiate that the plaintiff was ever informed that if he wishes to appeal, he could ask the police through the prison authority for the said documents and neither is there any evidence that he was ever informed that the documents were kept by the police. Further still, there is no evidence that the prison authorities were ever informed that the first order and lampiran A were with the police and if the plaintiff had intended to appeal, he could request from the police for the same. On this score, it would appear, with respect that the response from learned federal counsel seemed to be a desperate attempt to overcome the grave injustice which is so apparent and that was placed against the plaintiff by the police. Further and regrettably, it also seemed not to reflect the true state of affairs and the bona fide of the police but rather a calculated and unauthorised act with ulterior motive which had consequently hampered, frustrated and stultified the apparent opportunity which was granted to the plaintiff to appeal to the Deputy Minister before he considers if it is justified for him to issue the second order or to release him. This court finds that the act of the police as complained by the plaintiff is patently unfair and unfair to the meanest intelligence and arguably tantamounts to an unauthorised tactical manoeuvre with an ulterior motive to circumvent the right of appeal granted to the plaintiff by the Deputy Minister.

[50] It is important to stress that mere administrative difficulties, simpliciter, are not, in the court's view sufficient to deprive the plaintiff of the

most crucial set of documents which he was asked to acknowledge as having received but was not handed to him on the grounds that it was required for administrative and documentation purposes, 'it has been said convenience and justice are often not on speaking terms' (see per Lord Atkin in *General Medical Council v Spackman* [1943] 2 All ER 339 at p 341; *R v Hull Prison Board of Visitors, ex parte St Germain and others (No 2)* [1979] 3 All ER 545). It is also important to stress that administrative convenient cannot override an individual right to appeal or to be heard as provided under the Federal Constitution where it affects the right to liberty. Where a statute confers power upon a person or body to make a decision affecting the rights, property or legitimate expectations of a person, prima facie that power must be exercised in accordance with the rules of natural justice or the duty to be fair (see per Lockhard J in *Ansell v Wells* (1982) 43 ALR 41 at p 589). In the light of the decision making process as a whole, it cannot be accepted as having conducted fairly as not only was the plaintiff been deprived of the opportunity to be heard but the procedure in the process of arriving at the decision was hampered and not conducted fairly as the representation from the plaintiff was not before the Deputy Minister due to the unauthorised and calculated act of the police which had deprived the plaintiff from exercising his right. The right of appeal granted to the plaintiff by the Deputy Minister was in fact an essential step so as to comply with the constitutional safeguard provided by arts 5(3) and 151(1)(a) of the Federal Constitution. Whilst this court has rejected all the other complaints raised by learned counsel for the plaintiff and on the finding of facts by the Deputy Minister but however, this court had to still critically examine the complaint as to the denial of the right of appeal where as a result, the plaintiff has been condemned unheard by issuing the second order under s 2(ii) of the 1933 Act.

[51] Having surveyed a plethora of case laws from common law jurisdictions and decisions locally, the rule *audi alteram partem* has become 'a rule of universal application' in cases of administrative acts or decisions affecting rights (see *Ridge v Baldwin* [1964] AC 40). In this respect, it is important to be reminded that the judicial review by the court is not against the decision but with the decision making process. In fact, the cases show that the courts take their duties in this respect very seriously and that they are able to protect the citizen or any group of citizen from the undue or improper exercise of authorities by the executive or in the decision making process. Thus, the protection of the judicial empire is needed by the aggrieved persons so that they can look with confidence to the courts for it.

[52] Accordingly, the reasoning of this court to set aside the second order briefly is on the following grounds:

(1) The plaintiff was made to acknowledge receipt of the first order together with lampiran A on 9 March 2007 but both the first order and lampiran A was not handed to the plaintiff until the expiry of the fourteenth day on 24 March 2007. Therefore, the plaintiff was deprived the opportunity to appeal or to be heard within the 14 days against the first order before the second order was issued.

(2) The reasons advanced for denying the plaintiff of both the first order and lampiran A as it was required for administrative and documentation purposes certainly cannot be sustained as a reasonable ground for refusing to hand over the said document to the plaintiff on 9 March 2007.

(3) Even if the reason advanced by the police for not having handed the first order and lampiran A is because it was required for the purpose of administration and documentation, surely a photo copy of the same could have been taken by the police for that purpose, alternatively, the same could have been returned to the plaintiff forthwith and before the expiry of the 14 days and not in the fashion as carried out in the instant case where the first order and lampiran A was not handed nor returned to the plaintiff until 24 March 2007 and this arguably smacks or is tainted with bad faith as complained by the plaintiff. Bad faith consist of dishonest use of power (see *Cannock Chase DC v Kelly* [1978] 1 WLR 4). In fact, when the plaintiff was taken from his home on 9 March 2007 at about 6pm and detained at the police station in Kluang, the police had sufficient time to do all the necessary and required documentation before he was taken to Kluang prison at about 10pm.

[53] In conclusion after having gone through the several affidavits filed on behalf of the plaintiff and the defendants, the submissions, both oral and written, together with the authorities as submitted by both parties and the facts and considering circumstances in the instant case, this court is satisfied that there has been a constitutional breach and violation of the rules of natural justice which has deprived the plaintiff from exercising his right of appeal to the Deputy Minister within the 14 days period as provided in lampiran A. It is with regret that this court has to find on the particular sets of facts and circumstances in the instant case, the second order as being null and void for the reasons which have already been stated above and the plaintiff is ordered to be released.

[54] In accordance with reason, law and justice, this court has no other option but to grant the order in terms of the prayers in the originating summons. Consequently, order in terms is granted for prayers 1, 2 and 4 of

the originating summons (encl 2). Accordingly, the second order dated 23 March 2007 issued by the Deputy Minister of Internal Security is set aside as being null and void and is of no legal effect.

Second order set aside.

Reported by Sally Kee